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No. 93-1420

In the Supreme Court

OF THE

United States

OCTOBER TERM 1993

FRANK LOCASCIO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

REPLY TO THE UNITED STATES' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I.

THE SECOND CIRCUIT'S RATIFICATION OF THE "FUNCTIONAL PRESENCE" INSTRUCTION REQUIRES REVIEW BY THIS COURT

The government attempts in its opposition to demonstrate to this Court that the theory and instructions upon which Frank LoCascio was convicted of the most grave criminal offenses were "commonplace." (Opposition at 18 n.10). To the contrary, the very authority marshalled by the government demonstrates that the theory of conspiratorial liability on which LoCascio was convicted is unprecedented and extraordinary.

The prosecutor told the district court below that:

> It is our position legally that Frank Locascio's presence served the purpose and that *he need not utter one word at all to be part of the conspiracy to kill Corky Vastola.*

(RT 6910) (emphasis added). He argued to the jury that, in a case bereft of evidence that LoCascio either perpetrated any charged offense or urged another to do so, Locascio's

presence in the apartment above the Ravenite rendered him guilty of crimes as varied as murder, loansharking, and gambling "*wholly apart from what he says or does.*" (RT 7825) (emphasis added).

The jury was then instructed:

> The defendant's presence may establish his membership in a conspiracy, if all the circumstances considered together show that his presence was meant to advance the goals of the conspiracy.
>
> * * *
>
> In other words, *presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.*

(RT 8058-8059) (emphasis added).

The Second Circuit's approval of the government's theory and the district court's instructions constitutes a clear break with the jurisprudence collected by the Solicitor General. *LoCascio* simply goes farther, and the additional step it takes is one against which this Court has cautioned.

The cases relied upon by the Solicitor General support an unobjectionable proposition: a defendant' presence at the scene of a crime is a factor which, when combined with attendant circumstances making obvious his intent to participate in that crime, is sufficient to support a conviction for conspiracy or the target offense. *See United States v. Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993) ("presence is a significant factor to be considered within the context of the circumstances under which it occurs"); *United States v. Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993) (presence in apartment sufficient to support conviction when attendant circumstances clearly indicate defendant was in knowing possession of contraband); *United States v. Andrews*, 953

F.2d 1312, 1318 (11th Cir. 1992) (circumstances surrounding defendant's presence at scene of conspiracy clearly suggest knowledge of its character and intent to participate in it).

United States v. Cochran, 955 F.2d 1116, 1123 (7th Cir. 1992), the case cited by respondent[1] which involves the instruction closest to the one at issue here, in fact buttresses petitioner's call for review by this Court of this important area of instructional jurisprudence. In *Cochran*, the Seventh Circuit ratified the following instruction:

> Mere presence at the scene of the crime or mere association with the conspirators will not themselves support a conviction. *Presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy.*

Id. at 1123 (emphasis in original).

It is certainly true that a defendant's presence *intended by that same defendant* to advance the object of a conspiracy is sufficient to support a conspiracy conviction. Both the *Cochran* and *LoCascio* instructions cited above, however, fail to require any design by a defendant at all; they simply require that presence *be intended by someone* to foster the scheme. So long as the scheme's leader, for instance, intends an unknowing watchman or deliveryman's presence to "advance the conspiracy," the guard or deliveryman could be convicted under the cited portions of the *Cochran* and *LoCascio* charges without a jury finding those defendants possessed the specific intent required to commit the crime of conspiracy.

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[1]The government also cites *United States v. Gutierrez*, 978 F.2d 1463, 1469 (7th Cir. 1992). That case expressly relies on the *Cochran* court's ratification of the "intent to advance" instruction.

LoCascio then surpasses *Cochran* in eroding the rule that "presence" without further proof of a specific intent to commit the target offense of a charged conspiracy cannot support conviction of that conspiracy. The "functional part" language of the *LoCascio* charge vitiates the requirement that a defendant's presence at least be intended by *someone* to "advance" the scheme. That subjective element is supplanted by a standard for conviction that a defendant's presence be proven to have advanced a conspiracy by serving a "function," a term itself left undefined. This is a remarkable theory of liability for a crime that is at its essence one of joint intent, for the "functional part" definition contains no mental state element. Not surprisingly, the government has been unable to locate any other case in which use of the "functional part" language in a jury instruction was approved on appeal.

It was the "functional part" language that permitted and supported the government's argument to the jury that petitioner could be found guilty of any and all crimes discussed in his presence "*wholly apart from what he [LoCascio] says or does.*" The notion that a party present at a conversation, be it public or clandestine, is responsible for anything there discussed by others, irrespective of that party's own words or deeds, is chilling. Granted, the government stresses that the conversations here took place at the Ravenite Social Club. But our government has never been granted the power to convict the inhabitants of that address or any other of the most serious criminal offenses wholly apart from what they say or do, and for good reason. It is, quite simply, a power inherently incapable of application to the guilty alone.

The government argues vigorously that the district court gave other correct instructions on the intent required to convict of conspiracy. That is true. But the government ignores the fact that the last definition of conspiratorial liability given to the jury was the "functional part" language.

Most importantly, by its use of the preface "in other words," the district court informed the jury that the "functional part" language was an alternative explanation, of equal importance to the preceding instructions, as to how presence could serve as the basis for a conspiracy conviction. Thus, the district court gave the jury both correct and incorrect definitions of conspiratorial liability.

In a long line of cases dating to *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), this Court has held that when a general verdict might have been based on a defective theory, the conviction must be reversed. *See Bachellar v. Maryland*, 397 U.S. 564, 571 (1970); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *see also Yates v. Evatt*, 500 U.S., 114 L.Ed.2d 432 (1991)(mandatory presumption); *Boyd v. California*, 494 U.S. 370, 377-381 (1990); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). That is certainly the appropriate remedy here, where petitioner neither committed the charged offenses nor expressed any intention to do so.

II.

THE SECOND CIRCUIT'S FAILURE TO REQUIRE EVIDENCE OF LOCASCIO'S INTENT TO COMMIT THE TARGET OFFENSES OF THE CHARGED CONSPIRACIES SETS ITS DECISION ON CONSPIRATORIAL LIABILITY IN CONFLICT WITH SETTLED LAW OF THIS COURT AND OTHER CIRCUITS

The government suggests that there was "ample evidentiary support for the jury verdicts finding petitioner guilty of knowingly and willfully having participated in the alleged conspiracies." (Opposition at 19). As petitioner has noted, however, the Second Circuit affirmed his convictions for murder, conspiracy to murder, and other grave crimes, exclusively on the basis of LoCascio's status as an advisor to

the alleged enterprise and presence during secured conversations at which illegality was discussed. Neither the Circuit opinion nor the government's opposition provides a single statement by petitioner of his intention to commit a crime; nor evidence of his prior awareness that the charged offenses would be discussed in his presence; nor any expression of assent to the commission of those offenses.

The government's opposition makes assertions such as "[p]etitioners' conversations in that apartment [the Ravenite] encompassed discussion of whom they had murdered and why" (Opposition at 3), but this is a mere rhetorical device. LoCascio never said anything about whom he had murdered and why. The best evidence of that fact is the government's failure to cite *any* statement of LoCascio in its opposition.

The Second Circuit's failure to require proof of petitioner's intent to commit the specific crimes charged as conspiratorial objects is novel and dangerous. Again, the cases cited by the government are instructive. In *United States v. Carson*, 9 F.3d 576 (7th Cir. 1993), the court rejected defendant's argument that while the government had demonstrated the existence of a conspiracy, it had failed to prove his part in the scheme. Relying on the *Cochran* language ("presence . . . intended to advance the ends of the conspiracy"), the court noted that "substantial evidence demonstrates that [the defendant] engaged in counter-surveillance for the purpose of protecting both [other defendants] and their investment in the five kilogram cocaine transaction." *Id.* at 588.

The defendant's actions during the commission of the charged offense in *Carson* reflect a specific and deliberate purpose to make the specific charged scheme succeed. *See also United States v. Martinez-Moncivais*, 14 F.3d 1030, 1035 (5th Cir. 1994) (overwhelming evidence to support jury verdict that defendant was aware that he was transport-

ing and delivering narcotics). Petitioner LoCascio was not present at the scene of the commission of any substantive offense. The *LoCascio* panel affirmed petitioner's wide-ranging convictions without evidence that he intended any target offense be committed. It is that lack of evidence of intent to agree which sets *LoCascio* in conflict with decisions of this Court and other circuits. *See* Petition at 13-18. And it is that conflict which necessitates this Court's examination.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari to consider the important questions presented.

Dated: April 22, 1994

Respectfully submitted,

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